

No. 48629-6-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

MCKENNA STEIN, Appellant.

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Appeal from the Superior Court of Kitsap County  
The Honorable Sally F. Olsen  
No. 15-1-01301-5

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**REPLY BRIEF OF APPELLANT  
MCKENNA STEIN**

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## I. ARGUMENT

### 1. Ms. Stein Was Unlawfully Seized.

Ms. Stein was initially seized inside the residence, while Mr. Yarber was being arrested. Ms. Stein is not contesting the lawfulness of the initial seizure. However, after she went outside with the officer, the continued questioning of Ms. Stein, without reasonable suspicion, was unlawful. The trial court ruled that the questioning outside the residence was a valid *Terry* stop based on the observations of drug paraphernalia in the house. However, the fact that there was drug paraphernalia in the residence did not give the officer reasonable suspicion to believe that Ms. Stein was engaged in criminal activity.

#### a. *The Trial Court Correctly Found That Ms. Stein was Seized When She Was Questioned Outside the Residence.*

As the State notes in its response, the State did not cross-appeal the trial court's findings that Ms. Stein was detained and the contact outside the residence was a *Terry* stop. Therefore, this court should not address whether or not Ms. Stein was seized. RAP 2.4(b). However, as discussed in appellant's brief, Ms. Stein was seized when she went outside with the officer and was questioned. The State incorrectly argues that Ms. Stein's stipulation that the officer walked outside with her and the findings by the trial court that Ms. Stein came out of the kitchen and went outside with the

officer is a finding that she did so on her own. (CP 27, 48). If the trial court intended to make a finding that Ms. Stein walked outside on her own, without being asked or told to come outside, it could have done so. It did not. That is because the record is clear that the officer did not recall whether or not he asked her to come outside. (RP 2-16-16 p. 11). Furthermore, it is consistent with the trial court's findings that Ms. Stein was detained.

In this case, Ms. Stein was originally detained at gunpoint in the residence while Mr. Yarber was arrested. She then went outside with an officer who asked her about the drug paraphernalia in the house. The officer did not testify to the exact questions and answers. (RP 2-16-16 p. 23). The State argues that when asked about the drug paraphernalia, Ms. Stein told the officer that she had a drug problem. However, the officer did not testify that she responded to his question by stating she had a drug problem; he testified that during their conversation, she stated she had a drug problem. The officer testified that he questioned Ms. Stein for ten to fifteen minutes about the paraphernalia in the house, her drug use, if anything was in her car, and ultimately asking for permission to search her car. The progressive intrusion is similar to *Soto-Garcia*, and was an unlawful seizure. *State v. Soto-Garcia*, 68 Wash. App. 20, 841 P.2d 1271 (1992).

b. *Ms. Stein Was Unlawfully Detained Because the Officer Did Not Have Reasonable Suspicion to Believe That Ms. Stein Was Engaged in Criminal Activity.*

The trial court correctly held that Ms. Stein was seized when she was questioned by the officers. However, the trial court erred by finding that it was a valid *Terry* stop because the officer had reasonable, articulable suspicion of criminal activity based on observing drug paraphernalia in the residence.

There is no reason to suspect that Ms. Stein, who was inside Mr. Yarber's residence when he was arrested, was in possession of the drug paraphernalia in his house. Also, there is no reason to determine that she *used* the paraphernalia. The State, in its response, cites *State v. Fisher*, in support of its argument that there was reasonable suspicion to detain Ms. Stein for a *Terry* stop based on the officer's observation of drug paraphernalia in the residence. *State v. Fisher*, 132 Wash. App. 26, 29, 130 P.3d 382, 383 (2006); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). However, the defendant in *Fisher* was charged with a municipal code violation, which prohibited *possession* of drug paraphernalia with intent to use. *Id.* at 29; *see also* SCC 10.48.020. However, under RCW 69.50.412(1), it is only a crime to *use* drug paraphernalia. *See State v. Rose*, 175 Wash. 2d 10, 19, 282 P.3d 1087, 1091-92 (2012); *State v. O'Neill*, 148 Wash.2d 564, 584 n. 8, 62 P.3d 489

(2003); RCW 69.50.412(1).


Furthermore, in *Fisher*, the defendant had a pipe, with burnt residue, in his pants pocket. *Fisher*, 132 Wash. App. at 29. The court held that the defendant's denial that the pipe was his was not believable where the pipe was in his pocket and had residue on it; and, therefore, the officer had probable cause to arrest him. *Id.* at 29-30. In this case, a pipe and foil was found inside a residence where Mr. Yarber lived and was being arrested on a felony DOC warrant; nothing was found on Ms. Stein's person. Also, there is no indication that there was burnt residue on the pipe or foil. Ms. Stein was not arrested for unlawful use of drug paraphernalia. Instead, the officer questioned her for ten to fifteen minutes about her drug use, if there was anything related to her drug use in the car, and requested consent to search the car.

## **2. CONCLUSION**

In conclusion, Ms. Stein was unlawfully seized by the progressive intrusion of the officer's questioning and request to search without reasonable suspicion that a crime had been committed. Therefore, the conviction should be reversed and all evidence obtained from the unlawful search should be suppressed.

Dated this 17<sup>th</sup> day of October, 2016.

Respectfully Submitted,



JENNIFER VICKERS FREEMAN

WSBA # 35612

Attorney for Appellant, McKenna Stein

Certification

I hereby certify that on 10/19/16, I delivered  
VIA: Email and Efiling, a true and correct copy of the  
document to which this certificate is attached  
for delivery to the Court of Appeals, Division II and  
the Kitsap County Prosecutor's Office at

kcpa@co.kitsap.wa.us. A copy was also mailed to the client.

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# PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL

**October 19, 2016 - 9:14 AM**

## Transmittal Letter

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### Comments:

Appellant's Reply Brief is attached.

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